IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.347 OF 1989

1. Yusuf Alamash Daryavardi,
   aged about 50 years,
   Occ: Agriculturist.

2. Arjun Bhima Jadhav,
   aged about 35 years,
   Occupation: Service.

Both residing at Miraj,
District Sangli. .... Appellants

- Versus -

The State of Maharashtra .... Respondent

Ms Sharmila Kaushik for the Appellants.

Shri B.H. Mehta, Addl. Public Prosecutor,
for the Respondent-State.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.

DATED: FEBRUARY 03, 2005

ORAL JUDGMENT (Per P.V.Kakade, J.):

1. The appellants/original accused Nos.1 and 2 have preferred this appeal against the judgment and order passed by the Sessions Court, Sangli, dated 4-5-1989 whereby appellant No.1 was convicted for commission of the offence punishable under Section 302 of the Indian Penal Code, hereinafter referred to as "the IPC", and was sentenced to suffer imprisonment for life, whereas appellant No.2 was convicted for commission of the offence punishable under Section 325 r/w Section 34 of

the IPC and was sentenced to suffer R.I. for two years and to pay a fine of Rs.500/-, in default to suffer R.I. for one-and-half month. This was inspite of the fact that appellant No.2 was originally charged for the offence punishable under Section 302 r/w Section 34 of the IPC. However, since no appeal is preferred by the prosecution against appellant No.2, we do not propose to go into that aspect.

2. The facts giving rise to the present case, in brief, are thus:-

The appellant Nos.1 and 2 are the residents of Miraj and Kognoli respectively. The deceased Parashuram Babu Koli was the resident of village Waddi. PW-1 Maruti Koli is the nephew of the deceased Parashuram. As the parents of PW-1 Maruti Koli expired during his childhood, he was looked after by deceased Parashuram. Besides Parashuram he has got two more uncles, namely, Gajanan and Vijay. Both Gajanan and Vijay reside separately with their families. The mother of Parashuram and his brothers are alive. The land of appellant No.1 Daryavardi is adjacent to the land of deceased Parashuram in village Waddi. The deceased Parashuram had taken the land of one Shanta Kunjire for cultivation purpose and he was serving as a **Patkari**. As a Patkari he was required to supply water under the

irrigation scheme to the respective farmers. Vijay was also serving as a Patkari in the Irrigation Department of the sugar factory. In February, 1988 there was sugarcane crop in the land of appellant No.1. There was one water chamber in the land which was taken by deceased Parashuram from Shanta Kunjire and there was another water chamber on the boundary of the land of appellant No.1 and one Pawar.

The incident in question occurred at about 5:30 p.m. on 8-2-1988 at which time deceased Parashuram and PW-1 Maruti had gone to their land to bring fodder. At that time there was Jawar crop in their land. The deceased Parashuram had then gone near the chamber which was on the boundary of the land of appellant No.1 and one Pawar. He was then closing the water. At that time, it is the case of the prosecution, that appellant Nos.1 and 2 went there. The appellant No.2 Arjun is the servant of appellant No.1. The appellant No.1 Daryavardi told the deceased Parashuram to give him more water. Thereupon the deceased Parashuram informed him that he would give water of two chambers and if he wanted more water, he should bring permission from the sugar factory. Even then the appellant No.1 persisted for more water. At that time the appellant No.1 was having one spade with him. It is then the case of the prosecution that both the appellants abused deceased

Parashuram. The appellant No.2 Arjun then caught hold of the arms of Parashuram and appellant No.1 assaulted him with the spade on his both the knees and also on the head. Parashuram fell down. PW-1 Maruti raised shouts and hearing the shouts, PW-4 Shivappa Naik and Parashuram Naik went there. Both the accused persons ran away from the place. The deceased Parashuram was then taken on the road. His clothes were blood stained. By that time one Rafik Patel came there on bicycle. The said Rafik Patel took Parashuram on his bicycle to the village. In the village, Parashuram told about the incident to his sister PW-3 Sakhubai Koli. Then Vijay, brother of the deceased took Parashuram by truck to Miraj. The deceased Parashuram was then admitted to Civil Hospital, Sangli at about 7:30 p.m. He was examined by PW-5 Dr. Bobade, Medical Officer. In the Civil Hospital PW-6 Head Constable Kadam, who was then attached to the Miraj Rural Police Station, recorded the statement of deceased Parashuram. In view of the said statement, offence was registered at C.R.No.10/1988 under Sections 325 and 504 r/w Section 34 of the IPC. PW-6 Kadam carried on investigation of the said offence. On the next day i.e., on 9-2-1988 he went to village Waddi and visited the place of the incident. He drew the panchnama of the scene of offence and recorded the statements of various persons. During the night of 10-2-1988, at about 12:30 midnight, Parashuram succumbed

to his injuries and the offence came to be registered against the appellants under Section 302 r/w Section 34 of the IPC. The inquest panchnama was duly drawn and thereafter the body was sent for examination of which the report was received in due course, which is part of the record. PSI Nadaf (PW-7) took over the investigation after the offence under Section 302 of the IPC was registered.

The investigation officer recorded the statements of various other witnesses and arrested both the appellants on that very day i.e. 10-2-1988. He also attached the clothes of the appellants under panchnama. The clothes of the deceased were already attached under panchnama. In the course of the investigation, appellant No.1 revealed the information as a result of which the recovery of weapon of offence i.e. the spade was made under the memorandum of panchnama. The attached clothes and the other articles were sent to the chemical analyser for examination, whose report was received in due course and which is part of the record. On completion of the investigation, chargesheet was sent to the Court of Judicial Magistrate, First Class, Miraj. As the offence under the chargesheet was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions.

3. The learned Sessions Judge, Sangli, framed the charge against the appellants/accused for commission of of the offence under Section 302 r/w Section 34 of the IPC. They pleaded not guilty. By and large the defence of both the accused is that at the relevant time there was exchange of words and a scuffle ensued in which course the deceased Parashuram fell on the ground and suffered injuries and he was at that time under the influence of alcohol. The learned Sessions Judge proceeded to record the evidence of the prosecution which consists of seven witnesses, supported by documentary evidence. On conclusion of the trial, the learned Sessions Judge held that it was proved that the appellant No.1 had committed murder of deceased Parashuram and proceeded to convict and sentence him in the aforesaid manner. However, it was held that the prosecution did not prove that appellant No.2 was guilty of the offence under Section 302 r/w Section 34 of the IPC and on the basis of the available record, he was convicted for the commission of offence punishable under Section 325 r/w Section 34 of the IPC. Hence the present appeal.

4. We have heard the learned Advocates for both the parties and with their help we have perused the entire evidence on record.

At the outset, it is to be noted that it would be just and proper on our part to appreciate the ocular evidence on record in order to decide the appeal in proper perspective.

Before turning to the eye-witnesses' account of the incident, it must be noted that the presence of both the appellants at the relevant time on the spot of the incident is neither challenged nor is in doubt. The moot question round which the entire case revolves is regarding the authorship of the crime with which the appellants are charged. For that purpose, the testimony of PW-1 Maruti r/w the testimony of PW-4 Naik is required to be scrutinised.

PW-1 Maruti Koli is the nephew of deceased Parashuram. The witness at the relevant time was 15 years old and was rightly administered the oath after ascertaining that he understood the sanctity of the oath in the case during the trial. The version given by witness Maruti regarding the actual incident is to the effect that about 4:30 p.m. on the fateful day he was present in his field and was cutting fodder. There was Jawar crop in his land and in the land of appellant No.1 there was sugarcane crop. There was one water chamber in their land and there was also one water chamber on

the boundary of the lands of appellant No.1 and one Pawar. At the time when this witness was cutting fodder, the appellant Nos.1 and 2 came near their chamber where deceased Parashuram was present and was about to close the water flowing from the chamber. At that time appellant No.1 demanded more water from Parashuram. Parashuram informed him that he would give more water to him, but for that purpose permission from the sugar factory would be required. Thereafter appellant No.1 still insisted for more water but Parashuram did not allow the same. At that time appellant No.1 had one spade in his hand. The appellant No.1 gave abuses to Parashuram. The appellant No.2 Arjun, who is the servant of appellant No.1, also started giving abuses to Parashuram and then he caught hold of the hands of Parashuram and appellant No.1 Daryavardi assaulted him by the spade on his both the knees and also on the head, as a result of which Parashuram fell down. Maruti raised shouts and hearing his shouts, PW-4 Naik and one other person by name Parashuram Naik came on the scene. Thereafter they went near Parashuram who had fallen on the ground. In the meantime the appellants/accused ran away.

This version is supported by PW-4 Shivappa Naik who has testified to the effect that hearing the shouts of Maruti, he went to the scene of the incident and

noticed that Parashuram was lying on the ground and also noticed that there was a spade in the hands of appellant No.1 Daryavardi and appellant No.2 was present there. The clothes of Parashuram were blood stained. He went near him and seeing Naik and others, the appellants/accused ran away. They then took Parashuram on road and therefrom on the bicycle of one Rafik Patel to the village. Finally, he was taken to a hospital at Miraj and then to the Civil Hospital at Sangli. The testimony of Maruti, supported by the testimony of witness Naik, undoubtedly establishes not only the presence of both the appellants/accused at the relevant time but also the fact that the appellants assaulted Parashuram in the manner as testified to by witness Maruti.

PW-3 Sakhubai Koli is the sister of deceased Parashuram. Her testimony shows that she had gone to Miraj on that day and when she returned at about 5:30 p.m., her brother Parashuram arrived at home with the help of Rafik Patel and she saw that his clothes were blood stained and when she asked as to what had happened, he informed her that appellant No.1 had assaulted him with a spade on his knees and on the head and that appellant No.2 had caught hold of him when appellant No.1 had assaulted him. Therefore, the testimony of PW-3 Sakhubai establishes the fact that

deceased Parashuram disclosed to her the names of the appellants/accused to be the persons as the assailants immediately after the incident when he was brought home in injured condition. At this juncture it may be noted that the disclosure made to Sakhubai by deceased Parashuram amounts to oral dying declaration which is again corroborated by the direct ocular evidence of Maruti and which is again corroborated by PW-4 Naik. It must be noted that even the testimony of Sakhubai cannot be doubted even for a moment for the simple reason that it is amply corroborated by the entire direct as well as the circumstantial evidence on record. Moreover, she as well as the other witnesses have no reason to implicate the appellants falsely. The testimony of PW-4 Naik also is found to be trustworthy, firstly, because he is an independent witness and secondly his presence on the scene of the incident is found to be quite natural when he arrived at the scene in response to the shouts of Maruti, who had witnessed the assault. In view of this position, we are inclined to hold that the testimonies of PW-1 Maruti, PW-3 Sakhubai and PW-4 Naik are totally trustworthy and there is absolutely no reason to discard them from consideration.

5. The evidence of PW-6 Head Constable Kadam shows that he was on duty at the relevant time at the police station and when he came to know about the incident and

admission of the injured Parashuram in the Civil Hospital at Sangli, he visited the hospital and contacted Dr. Bobade (PW-5) and then recorded the statements of Parashuram Babu Koli. According to him, Parashuram was conscious and was in a position to give statement. After the statement was recorded, his thumb impression was taken below it and it was thereafter treated as F.I.R. and is on record at Exhibit-27. His testimony is again supported by PW-5 Dr. Bobade who evidently was attached to the Civil Hospital, Sangli and at about 7:30 p.m. on that day had examined the deceased Parashuram. He has also supported the testimony of PW-6 Head Constable Kadam regarding the recording of statement by him. This aspect takes us to the document at Exhibit-27, which is the statement of Parashuram which was treated as F.I.R., and after the death of Parashuram has assumed the characteristic of dying declaration.

6. If we peruse the contents of the statement of deceased Parashuram, it is quite plain that whatever doubts might be in the mind would be set at rest so far as the assault on the deceased is concerned at the hands of both the appellants. He has narrated the incident and the reason as to why it so occurred. He has stated that when he refused to give more water to appellant No.1, he got enraged and started abusing him. His

servant, appellant No.2, was along with him at that time. The appellant No.1 caught hold of him (deceased Parashuram) and appellant No.1 assaulted him by the spade on both his knees and assaulted him with the edge of the spade on his head which resulted in bleeding injuries to him. This FIR-cum-dying declaration, which is corroborated by the entire ocular as well as circumstantial evidence on record, pins down the appellants establishing the fact that the authors of the assault were none else than the appellants. The manner in which the assault took place also is established by consistent evidence of witness Maruti, which is again corroborated by the other circumstances which have surfaced on record. In view of this position, we are inclined to accept the document at Exhibit-27 as the dying declaration which is supported not only by the oral dying declaration given to PW-3 Sakhubai and PW-4 Naik which leaves no doubt about the overt acts at the hands of both the appellants.

7. This aspect takes us to the medical evidence on record. PW-5 Dr. Bobade is the Medical Officer who examined Parashuram on his admission in the Civil Hospital at Sangli. He has narrated the injuries which he noticed after the clinical examination of Parashuram and the same are as follows:

"1. C.L.W. over right forehead 2 x 1 cm., scalp deep minimum bleeding with no fracture clinically.

2. C.L.W. over left parietal region 5 x 1 cm. scalp deep minimum bleeding with no fracture clinically.

3. Minor abrasions over both knees about 1 x 1 cm."

According to him, there was no evidence of fracture and the injuries had occurred within six hours of his examination. He has testified that the injuries Nos.1 and 2 might have been caused by a hard and blunt object and has issued the certificate accordingly. He has further stated that after X-ray examination it was noticed that there was no evidence of fracture of skull bone. He has further stated that if there is small crack on the outer table of the skull, then there is a possibility that crack may not appear in the X-ray. The learned Advocate for the appellants tried to make much about this statement, submitting that when the Medical Officer was not in a position to testify to the effect that there was fracture, offence under Section 302 of the IPC cannot be considered. In this regard, we must note that the Medical Officer has further testified to

the effect that when he examined the patient, he noticed that the injuries were not grievous but when the patient died, then the injuries were considered as grievous. He further volunteered that he was not in a position to predict about the head injuries. We have given our anxious consideration to these submission. In this regard it must be noted that the cardinal principle of criminal jurisprudence, as ruled by the Apex Court in the case of **State of Madhya Pradesh v. Dharkole alias Govind Singh and others,** reported in 2005 Cri.L.J. 108, is to the effect that "It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'. It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Eye-witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility".

Therefore, if we examine the evidence revealed in the present case on the touchstone of the ratio laid

down by the Apex Court, there cannot be any doubt whatsoever that the ocular testimony of PW-1 Maruti, which is again supported by the other circumstantial evidence on record, has to be accepted over the abstract and theoretical opinion given by the Medical Officer in this case. This is more so when we peruse the post-mortem examination report. PW-2 Dr. V.N. Aphale is the Medical Officer who has conducted the post-mortem examination. The post-mortem report proved by him establishes the fact that the head injuries suffered by deceased Parashuram at the hands of appellant No.1 was not only grievous but in fact was fatal, as can be seen from the cause of death recorded by the said doctor to the effect that it was due to shock due to blunt to brain, compression of brain and intraeranial haemorrhage. Therefore, if we take into account the entire medical evidence on record, including the post-mortem report, there is absolutely no doubt that it is not inconsistent with the ocular evidence on record against the appellants.

The learned Advocate for the appellants submitted that the ocular testimony of witness Maruti as well as the statement in the dying declaration showed that there was assault on both the knees of the deceased but in fact the post-mortem examination has not revealed any serious injury except abrasion on both the knees.

However, this aspect cannot be given much importance only on the ground that there was no serious injuries appearing on the knees of the deceased. The fact remains that the fatal injury suffered by the deceased was the head injury which was the result of the blow given by appellant No.1 to the deceased while he was held by appellant No.2. Therefore, we are of the view that absence of serious or grievous injury or any sign of such injury on both the knees of the deceased would not be sufficient to discard the other evidence as noted earlier and therefore this submission made on behalf of the appellants has to be discarded in toto.

8. The circumstantial evidence on record includes the recovery of spade at the instance of appellant No.1 who is stated to have volunteered to the investigation officer on 15-2-1988, while he was in police custody, that he would take them to the spot where the spade was hidden. Accordingly, he took the police to the said spot and the spade was recovered which was seized under panchnama. It is significant to note that the defence did not challenge the panchnama as well as the memorandum of recovery of the spade and it was admitted under Section 294 of the Code of Criminal Procedure. However, if such admission is kept aside for a moment, the testimony of PW-7 J.N. Nadaf, the investigation officer, is sufficient to show that the recovery of the

spade i.e., the weapon of offence was indeed made at the instance of appellant No.1 and therefore there can be no doubt whatsoever with regard to the recovery of the weapon of offence, especially when such weapon of offence was identified by PW-1 Maruti in the cross of his testimony when he has stated that article 14 i.e. the spade was the similar spade which was in the hands of appellant No.1 at the time of the incident. Similarly, the C.A. reports are also sufficient to show that the clothes of deceased Parashuram as well as the appellants/accused were stained with blood and though the group of the blood could not be identified, it was human blood. In the absence of any other defence theory as to how the blood stains appeared on the clothes of the deceased as well as the appellants/accused, conclusion has to be drawn that the blood stains on the clothes of all the concerned were of deceased Parashuram which was the result of assault at the relevant time and place.

9. For the reasons recorded above, we are in complete agreement with the learned trial Judge when he came to the conclusion that both the appellants/accused were guilty of the offences for which they were convicted and sentenced accordingly. In the result, the appeal fails and has to be dismissed and stands dismissed.

Both the appellants/accused who are on bail shall surrender to the Court of Sessions, Sangli to undergo the sentence imposed upon them within four weeks from today. Their bail bonds stand cancelled.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)